In the Supreme Court of the United States

OCTOBER Term, 1975

No. 75-1088

COREX CORPORATION, D/B/A QUICK CORPORATION OF AMERICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Section 4161 of the Internal Revenue Code of 1954 imposes a 10-percent excise tax on the price charged by the manufacturer, producer, or importer on the sale of fishing equipment. The question presented by the petition is whether petitioner or Jon H. Importing Company was the importer of "Quick" brand fishing reels and supplies. If, as the court of appeals held, petitioner was the importer, the excise tax was properly imposed upon the price which petitioner charged to its customers and not upon the lower price that Jon H. charged petitioner.

The pertinent facts are essentially undisputed. Petitioner was incorporated in 1965 by Rupert and Lotz Kuntz, who owned 75 percent of its stock and who, together

with their mother, owned Deutsche Angelgerate Manufaktur (D.A.M.), a German firm which manufactured "Quick" brand fishing equipment[1] (Pet. 4; Pet. App. B 2). Between 1965 and 1968, petitioner concededly was the importer of "Quick" equipment and the Gladding Corporation, a separate, unrelated entity, was the distributor. In June, 1968, petitioner took over the distribution activities of Gladding and substituted a new entity, Jon H. Importing Company ("Jon H."), as the sole importer of record (Pet. 4-5; Pet. App. B 2-3).

Jon H. in turn designated petitioner as "sole distributor" of "Quick" products. However, Jon H. never put up any of its own funds in connection with the importation but received advances from petitioner and credit from the German exporter. Jon H. was a proprietorship owned by Ruth Nessley. It was operated by her husband, John Nessley, who was also an officer and customs broker at the Edward Zerwekh Company, the customs brokerage firm which handled the details relating to the physical importation of D.A.M. products (Pet. 5; Pet. App. B 2-4).[2]

On these facts, the Commissioner of Internal Revenue determined that petitioner and not Jon H. was the importer of the products because petitioner advanced all of the necessary funds and was the "inducing and efficient cause of the importation." *Import Wholesalers Corp.* v. *United States*, 368 F.2d 577, 585 (Ct. Cl.). As a result, the

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[1]"Quick" equipment was exported to this country by Anton W.C. Denker, an export firm in Hamburg, Germany (Pet. 4; Pet. App. B 2).

[2]Jon H. was formed with initial capital of $500, which was later increased to $1,000 (Pet. App. B 3). It had no separate place of business (it operated out of the Nessleys' home) and had no employees or warehouse facilities (Transcript of Proceeding, May 16, 1973, p. 120).

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Commissioner imposed the excise tax on the price at which petitioner sold the goods to its customers and not on the lower price petitioner paid Jon H. In this refund suit, the district court held that Jon H. was the importer for excise tax purposes (Pet. App. A 1-7). The court of appeals reversed (Pet. App. B 1-9).

1. Petitioner contends that the court of appeals improperly substituted its factual conclusions for those of the trial court. But as the court of appeals stated (Pet. App. B 5), its reversal was based on the trial court's erroneous reliance upon the labels of "importer" and "distributor" which petitioner and Jon H. employed in their written agreements. The court of appeals correctly held that for excise tax purposes those paper designations must yield to the economic realities of the relationship between petitioner and Jon H.

The decision of the court of appeals is in accord with the applicable precedents which recognize that identification of the "importer" for excise tax purposes does not depend on the formalities of the law of sales. See *Handley Motor Co.* v. *United States*, 338 F.2d 361 (Ct. Cl.); *Import Wholesalers Corp.* v. *United States, supra;* and *Sony Corp. of America* v. *United States*, 428 F.2d 1258 (Ct. Cl.). Thus, the fact that title to the imported goods may temporarily reside in one party which acts as a conduit on behalf of another party is of no consequence. See *Handley Motor Co.* v. *United States, supra*, 338 F. 2d at 364, and *Import Wholesalers Corp.* v. *United States, supra*, 368 F.2d at 583. The economic realities determine who is the importer on the basis of who is the "inducing and efficient cause of the importation." *Import Wholesalers Corp.* v. *United States, supra*, 368 F.2d at 585.

Here, there can be no doubt that the economic realities were that petitioner, and not Jon H., was the "inducing and efficient cause of the importation." Petitioner was the

source of the initial commitment to purchase each shipment of "Quick" equipment as it became available for export and purchased all of such equipment "imported" by Jon H. (Pet. App. B 3). As each shipment arrived in this country, petitioner advanced the necessary funds to Jon H. to meet its expenses (Pet. App. B 4, 8). Indeed, Jon H. placed orders with the exporter only when it had received an order in the same quantity from petitioner (Govt. Ex. U). Jon H. received unsecured credit from the exporter, and paid the exporter for goods only after petitioner paid Jon H. Finally, Jon H. had minimal assets and received a small one percent commission for its services (Pet. App. B 3-4, 8).

On these facts, the court of appeals correctly concluded that Jon H. performed no meaningful function which would justify its classification as an importer. Thus, for purposes of the excise tax, petitioner was the importer of the goods.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

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[3]Contrary to petitioner's contention (Pet. 24), the decision of the court of appeals does not conflict with *Sony Corp. of America* v. *United States*, *supra*. Unlike the situation here, the named importer in *Sony* functioned as an independent business and had previous bona fide dealings as the importer with the foreign manufacturer before the foreign manufacturer formed a domestic subsidary corporation for the distribution of its products in this country. Moreover, the named importer performed substantial services and actively maintained relationships with Sony distributors.

Petitioner's reliance (Pet. 28) upon Rev. Rul. 67-209, 1967-1 Cum. Bull. 297, is similarly misplaced. That ruling rests on the same economic analysis employed by the court of appeals in this case to determine who was the importer.